No. 97-1250

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WESLEY JOHNSTON, a Minor by his Parents and Natural Guardians, Domenica Johnston and William Johnston and DOMENICA JOHNSTON and WILLIAM JOHNSTON, on their own behalf,

Petitioners,

vs.

JENNIFER GALLANT, M.D., JEREMY HEWENS, M.D., DELAWARE VALLEY FAMILY HEALTH CENTER, RUBY P. HUTTNER, M.D. and HUNTERDON MEDICAL CENTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS JEREMY HEWENS, M.D. AND DELAWARE VALLEY FAMILY HEALTH CENTER

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STATEMENT PURSUANT TO RULE 29.6

The parent company for Respondent Delaware Valley Family Health Center is Hunterdon Medical Center. Delaware Valley Family Health Center has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE[1]

In this medical malpractice action, petitioner Wesley Johnston and his parents, Domenica and William Johnston, allege the respondent health care providers are responsible for Wesley's cerebral palsy, which they claim resulted from alleged injuries to the child during labor and delivery. The jury was presented with expert medical testimony from all parties at trial which established that the infant petitioner was healthy at birth and which refuted the theories of petitioners' medical witnesses that the child's neurological injury was caused by purported asphyxiation during labor and the use of vacuum extraction to assist delivery. Accordingly, following a trial that lasted several weeks, the jurors rendered a defense verdict, finding specifically that Dr. Jeremy Hewens was negligent, but that his negligence was not a proximate cause of injury, and that the other defendants were not negligent.

Following an unsuccessful motion for a new trial, petitioners appealed to the United States Court of Appeals for the Third Circuit, claiming the verdict was against the weight of the evidence, and that purported errors by the trial court required that a new trial be granted. The Third Circuit affirmed the trial court's refusal to order a new trial, commenting specifically on petitioners' claim that the trial court erred in permitting jurors to submit questions during trial, a procedure to which petitioners made no objection until the trial was nearly over. While it declined to rule on the propriety of permitting

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1. Although the within brief is submitted on behalf of respondents Jeremy Hewens, M.D. and the Delaware Valley Family Health Center, we have been advised by counsel for respondents Huttner, Gallant and Hunterdon Medical Center, that the positions of those respondents regarding certiorari are identical to the stance of Dr. Hewens expressed herein, and that they will rely upon this submission as their statement in opposition to the petition.

jurors to submit questions, the Third Circuit made clear that the manner in which the questioning was permitted could not amount to an abuse of discretion by the trial court because "the court must be able to control how the trial is conducted" (A-15).

Petitioners now urge this Court to review their case, presenting the following question for review: "Did the trial court err in permitting the jury to pose questions on complex medical topics to physician fact- and expert-witnesses?" (Petition for Writ of Certiorari, page i). However, in expounding on the issue before this Court, petitioners make clear that they "do not presently challenge the trial court's discretion in **permitting** juror questions in general" but contend only that "the **invitation** to formulate such questions" and "the **manner** in which the questions were put" was prejudicial to their case (Petition, pages 10-11). Thus, even if there was any merit to petitioners' completely unsupported contention that the result at trial would have been in their favor but for purported procedural errors, the precise issue petitioners wish this Court to review is unclear. Moreover, the factual context in which petitioners have presented their question for review is so inaccurate that it seems designed to purposely mislead this Court. There was absolutely not a single instance during trial where the court permitted the jurors to "pose questions" to any witness on any topic. In short, petitioners present no basis which warrants granting their Petition for a Writ of Certiorari.

A. The complete lack of credible evidence connecting petitioners' injury with purported negligence by respondents.

At its crux, the trial of this action was concerned with determining the cause of the tragic circumstance out of which the litigation arose: the development of permanent brain damage

by a newborn infant which would forever alter the life of that child and his family. The importance of determining who, if anyone, was responsible for the infant petitioner's condition, and the highly technical theories of causation propounded by each of the multiple parties to the litigation, necessitated the presentation of complex medical evidence by numerous expert witnesses at trial. The totality of that evidence provided ample basis for the jury to conclude, as it did, that petitioners failed to prove the child's condition was caused by a deviation from accepted standards of medical care by any respondent in this case.

Petitioners' expert medical witnesses, Dr. Gilberto R. Pereira, a neonatologist, and Dr. Ronald J. Jacobson, a pediatric neurologist, both opined that events during his mother's labor caused the infant petitioner's condition (85, 156).[2] Dr. Pereira presented his theory quite specifically, claiming that the child's condition was the result of a combination of two factors, the purported "lack of oxygen getting to the fetus," or asphyxia (85) during labor, and the application of suction by a vacuum extraction device which was used in a final attempt to deliver the child vaginally before a surgical delivery was performed (85). According to Dr. Pereira, the purported asphyxia caused a build-up of acid in the blood vessels of the child's brain, allegedly damaging the inner surface of the vessels, which were then purportedly "stretched" and further damaged by the suction of the vacuum extraction (85). Dr. Pereira testified that these factors, in combination, allegedly led to the formation of blood clots that occluded the child's middle cerebral artery, causing the brain damage at issue (84, 85, 87).

On cross-examination, however, the basis for the theories of both Drs. Pereira and Jacobson were revealed to be flawed.

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2. Numbers in parentheses refer to pages of Petitioners' Appendix submitted in their appeal to the United States Court of Appeals for the Third Circuit.

The doctors admitted that the absence of meconium (a sign of fetal distress) prior to birth, as well as the infant petitioner's completely normal presentation at birth (with strong Apgar scores and a vigorously beating heart) were highly unusual findings in a child who had purportedly been asphyxiated (109-10, 186-87). Dr. Pereira further admitted that the child's blood Ph, which was the factor he most vehemently cited in support of his opinion that asphyxiation and the resulting acid build-up had occurred, did not support a diagnosis of asphyxiation by the standards of the American Academy of Pediatrics (113-15). In addition, both doctors were forced to admit that the causation scenario they propounded was merely theoretical, that events such as this often occur without asphyxia (130, 174-75), and that what caused a blood clot or other occlusion to enter the child's middle cerebral artery and block the blood flow to an area of his brain could not be definitively determined (128-29, 172).

As the trial progressed, expert witnesses presented by the respondents gave testimony that apparently convinced the jury that the asphyxiation/vacuum extraction combination theory propounded by petitioners was not the cause of the injury in this case. Robert A. Zimmerman, M.D., a pediatric neuroradiologist, testified that there was evidence here that emboli (blood clots or other small pieces of material) entered the infant's middle cerebral artery and blocked blood flow, causing a stroke and the resultant brain damage (299). However, Dr. Zimmerman made clear that (1) emboli of this kind typically come from the heart and are not related to asphyxia (299); (2) the emboli here could not have been caused by the vacuum extraction attempts because even if a blood clot could have developed on the surface of the child's scalp as a result of the suction application, it would not be able to travel backward, against arterial blood flow, to reach and occlude the middle cerebral artery (304); (3) in his twenty years of experience with

injuries such as that here, he has *never* known of a vacuum extraction producing this sort of injury (306); (4) the injury here was not caused by any sort of trauma to the child's head (306); and (5) the radiological studies of the infant petitioner's cerebral arteries revealed no evidence of the "irritation" which was a key component in the causation theory propounded by petitioners' experts (308).

Defense experts Mark Morgan, M.D., an obstetrician specializing in high-risk pregnancies, and obstetrician-gynecologist Anthony Quartell, M.D., also reviewed the petitioners' medical records, particularly those involving the labor and delivery at issue here. Both doctors testified unequivocally that the causation scenario proposed by petitioners' experts had no medical basis. Indeed, the doctors made clear that the blood gasses and fetal monitor recordings, as well as the child's completely healthy presentation at birth, ruled out the possibility that he had been asphyxiated or that his blood had been acidotic (681-82, 746-47, 762-64, 779-80). Drs. Morgan and Quartell also agreed that there was no causal connection between the use of the vacuum extraction device and the child's brain damage (678-81, 769-70).

In addition, Robert Clancy, M.D., the pediatric neurologist who treated the infant petitioner immediately after birth at Children's Hospital of Philadelphia, offered persuasive testimony in which he detailed the medical tests he performed which he opined conclusively ruled out both the asphyxiation and vacuum extraction components of petitioners' causation theory. Dr. Clancy testified that not only did the child not appear to have been asphyxiated, but the CAT scan performed on him showed several specific, discrete strokes which were not consistent with asphyxiation (325-27). Furthermore, Dr. Clancy made clear that he eliminated purported trauma from the vacuum extraction attempts as a possible cause of the injury based on a carotid

ultrasound, which revealed the arteries leading to the child's brain had not been stretched or damaged by the suction (328-31). Dr. Clancy concluded that the injury here was caused by emboli of unknown origin that blocked the blood flow in the child's brain, causing the strokes (331, 332-33). Here, as is usually the case, the source of the emboli was never determined (333).

In reaching a verdict finding that no actions of Dr. Hewens or any other respondent proximately caused the infant petitioner's injury, the jury clearly credited the testimony of respondents' medical expert witnesses and rejected the asphyxiation/vacuum extraction combination theory propounded by petitioners. Since the verdict was based on a reasonable interpretation of the evidence presented at trial, and petitioners cannot specifically identify any area where purported errors by the trial judge may have affected the outcome, there is absolutely no basis for further appellate review by this Court.

REASONS FOR DENYING THE WRIT

Petitioners' factbound claim that the trial court abused its discretion by allowing jurors to submit questions during trial does not warrant review by this Court. As will be demonstrated herein, there is absolutely no compelling reason why the petition for a writ of certiorari should be granted, nor have petitioners made any arguments which indicate a basis for this Court's review. Indeed, the petition is nothing more than a last-ditch effort to obtain a new trial of an action that was fairly tried to a conclusion petitioners found disappointing, but which was supported by a plethora of evidence.

The sole issue before this Court concerns the propriety of juror questioning in this complex medical malpractice case. Although petitioners describe the purported error of the trial

court as "permitting the jury to pose questions on complex medical topics to physician fact- and expert-witnesses" (Petition, page i), their description is completely inaccurate.

At the beginning of the trial, the judge suggested to counsel that it might be helpful to permit jurors to submit questions as they arose in this very complex case. Counsel, including counsel for petitioners, agreed without objection and the trial judge thus instituted a carefully-controlled procedure by which jurors would submit *written* questions. Every time a question was submitted, the judge and counsel would evaluate the question outside of the presence of the jury before the question was asked of any witness. Indeed, no question was asked of *any* witness in the instant matter that was not previously scrutinized by the court and all counsel, with counsel being given the opportunity to raise any discussion and/or objection with the court in advance of the question being posed to a witness. The record in this case reveals that counsel for petitioners took advantage of this procedure and in certain instances objected to various questions posed during the defense case. When appropriate, petitioners' counsel also submitted jury questions to petitioners' witnesses during the petitioners' case. Thus, all counsel was given the opportunity to object to specific juror questions outside the presence of the jury, obviating any worries that an objection to a juror question would "place plaintiff's counsel in the appearance of an adversarial stance with the jury for objecting to the question" (Petition, p. 13), as petitioners now claim. Moreover, despite ample opportunity to object to the procedure as a whole (or to any part of it), counsel for petitioners never objected until nearly the very end of trial (712).

Several of the circuits have considered claims that permitting jury questions at trial constituted an abuse of discretion, requiring a new trial. These arguments have mostly arisen in criminal cases, and the procedures objected to often varied from those

employed here. There is not, nor have petitioners alleged, a conflict between circuits regarding this issue; in general, the courts have held that the decision to allow juror questioning is one for the discretion of the trial court to be determined based on the specific circumstances of each case. *See United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *United States v. Thompson*, 76 F.3d 442, 448 (2nd Cir. 1996); *United States v. Ajmal*, 67 F.3d 12, 14 (2nd Cir. 1995); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985); *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979); *United States v. Lewin*, 900 F.2d 145, 147 (8th Cir. 1990).

While the courts have noted that allowing juror-generated questioning should be the exception, rather than the norm, several courts have acknowledged that there are some circumstances where permitting juror questions will further the "truth-seeking attributes of the jury system." *United States v. Sutton*, *supra*, 970 F.2d at 1005. The court in that case noted that juror questioning "may occasionally be advantageous, especially in complex cases and under carefully controlled conditions." *United States v. Sutton*, *supra*, 970 F.2d at 1005. According to the *Sutton* court, juror questions can be particularly helpful "by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration." 970 F.2d at 1005, n.3. In *United States v. Douglas*, 81 F.3d 324, 326 (2nd Cir. 1996), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 202, 116 S. Ct. 2514 (1996), the Court noted that questions by jurors may be helpful where, for example, "a juror might not have heard all of a witness' answer or might reasonably need an explanation of some term the witness used." Similarly, the court in *United States v. Callahan*, *supra*, observed:

> If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to

> be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.

588 F.2d at 1086. This was undoubtedly the basis of the trial court's decision to permit jurors to submit questions in this case:

> THE COURT: Let me say this to all counsel. You can take these questions, and when you give your summations, you can address yourselves to these questions in your summations based on the evidence as you know it to have been presented. Sometimes we get a question from a juror because one juror hasn't kept up perhaps or has missed a point that another juror would have caught; and so when they are all together, they will answer each others questions. So we don't really have to answer every single one of these questions. But if it really just shows somebody missed something and it is not harmful just to let the witness answer it, I like to do it. That's my rationale for doing it.
>
> I certainly don't want to prejudice anybody or cause anybody some surprise by providing an opportunity for a witness to address something that is a surprise to somebody. But you can use these, you, yourselves, when you give your summations, and you know what the record is and you know what the answers to these questions would be from the record if you consider them to be worthwhile. Sometimes they are just repetitious. (720).

The courts have recommended that in those instances where juror questioning is deemed appropriate, the trial judge institute certain safeguards to eliminate the potential for prejudice to any party. *United States v. Cassiere*, 4 F.3d 1006, 1018 (1st Cir. 1993); *United States v. Sutton*, *supra*, 970 F.2d at 1005-06; *United States v. Bush*, 47 F.3d 511, 516 (2nd Cir. 1995); *United States v. Lewin*, *supra*, 900 F.2d at 148. The safeguards recommended are essentially identical to the procedure followed here — the jurors should submit their questions in writing to the court and the questions should be reviewed by the court with counsel, out of the presence of the jury, to permit free objection without the risk of antagonizing a juror.

Moreover, where, as here, counsel did not timely object to the decision of the trial judge to allow juror questioning, the courts of appeals have refused to reverse on that basis even in criminal cases where the liberty of the defendant was at stake (*see United States v. Cassiere*, *supra*; *United States v. Sutton*, *supra*) and in cases involving circumstances with considerably greater potential for prejudice than those alleged here. *See United States v. Bush*, *supra* (written questioning by jurors was permitted to metamorphose into direct dialogue between jurors and criminal defendant); *DeBenedetto v. Goodyear Tire & Rubber Co.*, *supra* (jurors permitted to ask 95 questions orally to trial judge, who directed witnesses to answer if he believed question was relevant).

Indeed, the only case we have found where juror questioning was the basis for an appellate court finding that a new trial was warranted was *United States v. Ajmal*, *supra*. In that case, the trial court, *over objection* by the criminal defendant's counsel, invited jurors to submit written questions at the close of the testimony of each witness, including the defendant himself. The Second Circuit's decision was based in large part on its determination that the "banal drug conspiracy"

did not involve "factual intricacies" sufficient to warrant juror questioning at all. 67 F.3d at 14.

In the instant case, there existed a sufficiently compelling basis for the trial court's decision that jurors would be permitted to submit written questions which could be asked of witnesses if all counsel approved. This was a medical malpractice case involving multiple defendants which necessarily involved a variety of theories of liability. The trial judge correctly anticipated that the trial would be lengthy and that a great deal of highly technical medical evidence would be presented to the jurors. In addition, the court apparently recognized the dramatic impact the events at issue had and the outcome of the trial would have on all its participants, and wished to ensure this important matter was given the careful consideration it deserved by a jury which had a full understanding of the evidence presented. Thus, the court indicated juror questions would be accepted in the above-described carefully-controlled manner, and no counsel objected.

Petitioners' objections now simply have no merit. Petitioners' primary contention is that the 55 juror questions that were submitted in writing were mostly irrelevant. In fact, some of these questions, listed verbatim in the petition, were never put to a witness. Most of the questions that were asked at the behest of a juror concerned areas that had already been addressed and, as detailed above, all counsel had the opportunity to object to any question outside the presence of the jury before it was asked. In every instance, even if the question was asked of a defense witness (leading to a purported "pro-defense spin" [petition, page 13]), petitioners' counsel had available the opportunity to cross-examine the witness regarding that area, and/or recall their own witnesses for rebuttal, if counsel believed rebuttal was necessary. Petitioners' counsel never requested rebuttal, but now complains that the juror questions

asked of defense witnesses (to which petitioners' counsel never objected) left petitioners "without the ability . . . to challenge them based on expert testimony of their own" (petition, page 13).

It is most telling that, after failing to object to the trial court's allowance of juror questions until the end of trial (when petitioners' counsel suddenly decided the practice was prejudicial to petitioners), and after moving for a new trial and pursuing an appeal to the Third Circuit based in large part on this issue, in their petition for a writ of certiorari petitioners are still unable to cite any single specific instance in which they contend that a carefully-screened juror question which their counsel had approved damaged their case so significantly that, had it not been asked, the verdict would have been different. This is because no such prejudice to their case by juror questions occurred. In this case, the jury simply determined (with ample basis) that the evidence presented by one party was more persuasive than the evidence presented by that party's opponent. Petitioners' dissatisfaction, standing alone (as it does), is not a reason sufficiently compelling to warrant this Court's review.

CONCLUSION

For all the reasons stated herein, the petition should be denied.

Respectfully submitted,

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